understand it, the donor or lender can come in and sue for specific performance to have the thing established; but the fact that it was not in fact established does not void the whole contract.

The Court: I think that might be an appropriate line of questioning if you apply it to this type of case.

Mr. Burling: My point is that the question of whether an element is or is not an essential element to the whole transaction is one of fact and not one of law, and
2120 hence an inappropriate question to inquire about of an expert.

The Court: You might ask her if she regards it as an element or not. You may be right. She may differ with you. She may differ with me. I think he has a right to go into that. I think you have a right to develop that line—in other words, whether in a case of this sort, under certain circumstances, where the intent is perfectly clear, you could obtain specific performance and thereby not have it void.

Mr. Boland: That is the purpose of this.

The Court: Ask her the general questions and ask her what cases she had seen on it. That will help us both and help me to understand it.

By the Court:

Q. Let me ask you this. Do you understand what he is talking about? A. Yes, I do.

Q. He says assume your instrument indicates on its face that a niessbrauch plainly and obviously, as you say this indicates, was intended, but, through some technicality, delivery did not come to pass, and those words, which could very readily have been put in, had not been put in. Would it be possible for a German court, rather than declare the whole thing illegal, to bring about
2121 that delivery by specific performance; in other words, by the father's making a demand on him,

like the Doctor said he could do? A. That is perfectly possible, because the German court, having before it all the evidence, the surrounding circumstances, the intent of the parties, and so on, can come to the conclusion that the immediate establishment of this right in rem was not such an essential element of the contract that its failure voids the contract; in other words, that the intent of the parties can be interpreted as directed toward a future establishment of that right; and that therefore the transaction can be upheld. That is possible. And, again, I think it comes back to the question of fact of essentiality.

The Court: That gives me the lead I wanted. Go ahead, now.

Mr. Boland: All right.

The Witness: I was testifying only on the basis of what I had before me and not trying to put myself in the place of a Judge.

By the Court:

Q. I think Mr. Boland's point is, if I do not misapprehend it, that he says if you read this through carefully—you say, on one hypothesis, at least, this would be void because you thought it was an essential element
2122 or an essential provision which had not been brought into effect; the lack of delivery— A. I was asked to assume that it was an essential element.

Q. You were asked to assume that? A. Yes.

Q. You did not undertake to say that in this particular case it was? A. No; I did not try to decide the case. I was asked to assume that this was an essential element.

Mr. Burling: If I may remind you, the assumption is something which Wilhelm von Opel testified to. I asked her to assume that Wilhelm von Opel insisted upon the terms.

The Court: I understand that.

Mr. Boland: That is exactly what these questions are designed to bring out. Mr. Burling made the assumption that this was an essential element. I did not say sine qua non, or but for, or without which.

Mr. Burling: I made the assumption in the terms of the testimony of Wilhelm von Opel and Fritz von Opel, that the father insisted upon this over the protest of the son.

The Court: I think, Mr. Boland, I will give you all the latitude you want, every particle you want, so
2123 long as you hold it to an analogous situation to this. The only trouble I am having is that when you get off into mortgages and into real estate transactions, mortgages with regard to personality, I do not get very much benefit from it: I have not quite seen how it ties into this. I know your principle, I think.

You say you wanted to develop that in a case like this, where you assume these facts, there might be specific performance which would make it valid, or there might be a demand later on that would make it valid. That is what the Doctor testified to. You can go just as far as you like on that line.

Mr. Boland: It is section 139 which they are applying to this gift agreement, which is not applied to niessbrauch. It applies to everything—mortgages and anything—any contract at all.

The Court: That is what I was trying to ask you a moment ago.

Mr. Boland: Section 139 applies to all contracts.

The Court: You gave me another section. What does 139 say?

By Mr. Boland:

Q. Go ahead, Miss Schoch. A. 139 is the general provision in the German Civil Code which says that if an

essential part of the transaction is void, the entire
2124 transaction is void if it had not been made even in the absence of the essential part. That is the general provision.

The Court: You are trying to bring up some specific cases decided by the German courts on Section 139, Mr. Boland?

Mr. Boland: Yes, Your Honor.

The Court: I will let you do that. If she finds any element missing that she thinks is necessary, she can tell. That is all right. I have the connection now. I did not know what you were talking about. It is 139 you are talking about?

Mr. Boland: Yes, Your Honor. We have got to find out what 139 means, how it has been interpreted, in order to apply it to our gift here.

The Court: All right.

The Witness: My difficulty, Your Honor, is that the question of essentiality and of intent of the parties is a question of fact which was decided in each case on the evidence before the court.

The Court: As he gives you the hypothetical cases, if you have any element of fact missing, you can just say that you cannot give a conclusion without it. I think that is the way you can answer. Go ahead.

By Mr. Boland:

2125 Q. Let us go back to our assumption on mortgage. A agrees to lend you $50,000. I agree to lend you $50,000. I don't know very much about you; I just met you recently. In return for this sum, I require you to establish a hypothek in respect to some securities to back up the loan. Now, because of our mere acquaintance, it is very important that this hypothek be established, and, in fact, I give you the 50,000 marks without having estab-

lished the hypothek. Let us assume that the reason why it was not established is unknown.

Can you, under German law, make a determination as to whether or not the contract is void? A. No, I cannot make that determination.

Q. You cannot? A. No.

Q. What additional facts would you need? A. I would want all the additional evidence showing whether the establishment—immediate establishment—of the mortgage was an essential element, whether that was the intent of the parties—

Q. You are not helping me very much, Miss Schoch. What I want to know is—basically, what I am driving at is—how far short of this sine qua non, without which absolute intent this thing would not be done, it would be void on the part of the donor, the lender or the
2126 seller in real estate, for example? I agree that if the man's intent is that "I just will not give this money, under no set of circumstances," must an immediate right in rem be established. I agree with you. I think it is clear under American law that it would be void, or at least voidable, on the part of the donor; but what I am trying to find out is how short of that can the intent be on essentiality and still have the contract valid? Do you see what I am driving at?

Now, we can stay here all day on hypothetical cases, but if you can give me how far the German law goes in showing essentiality, in setting up the facts for essentiality, which will void the contract, and draw a line between those cases in which it would be void and the cases in which it would not be void—

The Witness: I think that depends entirely on the facts of each case.

Mr. Boland: I think, Your Honor—

By the Court:

Q. Let me ask you this leading question. Isn't the law, he wants to know, in Germany as it is here, that the court must find, in order to make that absolutely essential, that the contract would not have been made but for that provision? A. Yes; that is what Mr. Boland himself stated.

2127 The Court: Isn't that what you want?

By Mr. Boland:

Q. Well, is it clear in your mind that unless there is an absolute intent on behalf of the donor—an absolute intent that he will not enter into this transaction but for the thing, just no question about it—under those circumstances only is the contract void for want of an essential element? It is the primary thing involved in the transaction—but for, and the absolute sine qua non. A. Well, it is an essential element in the transaction. One element is the gift and the other element—

By the Court:

Q. Is it the primary or a primary? A. It is a primary; it is not the primary.

Mr. Boland: That is what causes the trouble here, Your Honor. When you ask her to set up the case, she gives "the primary." Then when you ask her what the law is, she says "a primary."

The Witness: No. You are talking about a gift, Mr. Boland, and, of course, one element of a gift is the gift. That is the intent, the giving, and the question is whether the establishment of an in rem right or any other element of this gift in addition to this gift is so essential—

By the Court:

2128 Q. Is the German law any different at all in that regard than the law of America? A. I don't think so, Your Honor. There are cases which have upheld such transactions despite the failure of one element, because the court did not consider it so essential that its failure wrecked the entire transaction. There are other cases in which the courts have held that the failure of such an element did.

Mr. Boland: Your Honor, I think we can bring this down. I will just skip these hypotheticals and get down to the case and get down to the facts in the case here and see if we can bring some light on this.

By Mr. Boland:

Q. Directing your attention again, Miss Schoch, to the gift agreement, on the basis of the gift agreement alone, it is your position that the parties clearly intended the establishment of an immediate right in rem? That is right? There is no question about that or no misunderstanding about that? A. No. That is right.

Q. Now, from that do you deduct that the parties intended to establish an immediate right in rem? A. Yes.

Q. Without more? A. Without more, as far as
2129 I can determine from this.

Q. Now, let us assume that the parties did not intend to establish an immediate right in rem, but they intended to establish something other than an immediate right in rem, going to the problem specifically a little later on, but let us assume that in fact they did not intend to establish an immediate right in rem, and assume that you have the gift contract and you have the further assumption that they did not in fact intend. Would a German court hold that contract void? A. No, I don't think so.

Q. It would look to the intent of the parties? A. It would look to the intent of the parties.

Q. Now, let me read from page 78 of the record. The donor, in his deposition, was asked the following question:

"'Question: I ask that the witness take a look at the fifth paragraph of Plaintiff's Exhibit No. 5'—that is the niessbrauch provision, I believe—

A. That is the usufruct clause.

Q. (Continuing) —"'The gift agreement makes reference to niessbrauch, doesn't it?

"'Answer: Yes.

"'Question: What did you intend by the pro-
2130 vision concerning the niessbrauch?

"'Answer: I intended to accomplish that my son takes care of me if I should suffer financial breakdown and have no money any more.'"

This is an English translation.

(Continuing) "'Question: Did you ever intend to ask your son for any money while you had enough to support yourself?

"'Answer: I never intended that.

"'Question: Did you ever intend to ask him to do any more than provide for you and your wife's support when you had no money?

"'Answer: No.'"

Now, let us assume that you have the gift agreement together with that intent, the intent of the donor—

Mr. Burling: You are now assuming that the witness, Wilhelm von Opel, whose testimony on direct examination you have just read, is truthful; is that correct?

Mr. Boland: Of course, Mr. Burling; of course.

Mr. Burling: That is open to doubt. I just wanted to make the assumption clear.

Mr. Boland: I did not think there was any doubt.

Mr. Burling: There is grave doubt on it.

The Court: I think that is always an assumption.
2131 Mr. Boland: We will just assume that.

Mr. Burling: I won't make the point again. It is understood, Your Honor, that when my friend refers to the testimony of either Wilhelm or Fritz von Opel, he adds the assumption that they testified truthfully?

The Court: The witness has to assume that these are the facts and the truth.

Mr. Boland: I am giving her the assumption that this was the intent of the parties, and we are assuming that Miss Schoch is giving a true account of the German law.

By Mr. Boland:

Q. You have the assumption? Would you like me to re-read it? A. No.

Q. Those are the only two things you have got, Miss Schoch. A. Yes.

Q. With that in mind, would you say the intent was to establish an immediate right in rem? A. No, I would not say that.

Q. How would you interpret the contract under such circumstances? A. I would further say that this intent of the donor is in no way spelled out in this usufruct
2132 clause in the agreement.

Q. And, under German law, what effect would that have? A. Well, then, I would say the donor cannot testify to an intent which is no way spelled out in the agreement. In other words, you can look to the intent of the parties only to the extent that it is somehow expressed in your agreement, in the document.

Q. Now, let me ask you this further question right here and now: If the language as used in the gift agreement is unclear and ambiguous, you can certainly look to the intent of the parties as to what it means? A. Yes.

Q. And if the language is ambiguous, the fact that it

is not spelled out in the gift agreement—the actual intent —would not preclude the court from taking the actual intent into consideration, would it? A. That is right.

Q. But your testimony is that because the language of the gift agreement is so clear and unambiguous as to what the parties intended, inasmuch as the actual intention being something other than that, and not having been spelled out, that the court would disregard the intent; is that it?

A. Yes; that is my testimony.

2133 Q. Thank you. A. In other words, that the intent of the parties was directed toward a usufruct. That is a right in rem.

Q. Now, let us assume that these additional facts are before the court, reading from the testimony of Wilhelm von Opel at page 111 of the record:

"'Question: Whose idea was it to include a provision for a niessbrauch in Plaintiff's Exhibit 5?

"'Answer: Unfortunately, it was my idea to insert the niessbrauch but it was interpreted differently than it was intended. This was intended to be a security so that he'"—referring to his son Fritz—"'should support me if I lost everything.

"'Question: When you executed Plaintiff's Exhibit 5 you wanted the niessbrauch provision in it did you not?

"'Answer: Yes.

"'Question: At the time the agreement was executed you thought it was important to have a niessbrauch, did you not?

"'Answer: I considered it important as a safeguard for me in my old age.

"'Question: Would you have made the gift to your son if there had been no niessbrauch provision in the

2134 agreement?

"'Answer: I would not have signed the agreement if there has not been a protection for me in it.'"

Let me read that again.

"'Question: Would you have made the gift to your son if there had been no niessbrauch provision in the agreement?

"'Answer: I would not have signed the agreement if there has not been a protection for me it it.

"'Question: Now you testified that the niessbrauch was included in the agreement so that your son could support you in the event you lost everything, did you not?

"'Answer: Yes.

"'Question: Where in Plaintiff's Exhibit 5 does it say that you were to have a niessbrauch so that your son should support you if you lost everything?

"'Answer: That is not stated here.'"

Now, assume that that is what the court has, the gift agreement and all of the testimony of Wilhelm von Opel. Does that help you in interpreting the contract? A. First of all, I would have to find out whether the agreement was drawn by a lawyer.

Q. Let us assume that it was. A. Assuming that
2135 it was drawn by a lawyer, as I said before, a lawyer using the term "usufruct"—

Q. Must mean a right in rem? A. Must mean a right in rem. A lay person might use the term "usufruct" for something else that would be a misnomer, but I cannot imagine a lawyer using that term for anything but a right in rem.

Q. And as a result of which, with these three things—the gift agreement, the assumption that a lawyer drafted the agreement, and the actual intent of the party, the donor—your conclusion was what? A. I have not stated my conclusion yet.

Q. I am sorry. A. With no other facts, I might come to the conclusion that what was intended was the creation of a usufruct in the future.

Q. In the future. Would it be possible that what the

party had in mind was an in personam claim against the son? A. That seems out of the question to me.

Q That is out of the question because a lawyer drew the instrument? A. Yes.

Q. Taking what the father said he intended, that is a possibility, isn't it—that what he wanted was a claim against the son for income in his old age? A. That
2136 is possible. He did not think in legal terms.

Q. I think that is clear. A. Yes.

Q. Therefore, what the father intended, just on his intent alone, it might well have been that what he was interested in was just some legal claim against the son in the event he was in distress in old age, without any money? That is possible, isn't it? A. Well, sure, it might have been possible.

Q. Just take his intent as he stated it, without more, and then relate it to the gift agreement as such and without the assumption that a lawyer drew it. It might well be the interpretation—

Mr. Burling: Is counsel now withdrawing the assumption?

Mr. Boland: Yes, I am. I will make it quite clear.

By Mr. Boland:

Q. We will drop the assumption that a lawyer drafted this agreement. In other words, Miss Schoch, what I want to do is to relate the intent of the father—

Mr. Burling: I object to this line of questioning on the grounds that the plaintiffs have produced two witnesses, one, Fritz von Opel, who said that he went to see
2137 the most eminent lawyer in Germany, who prepared a draft, and Fritz then testified that he talked over the draft which his father, and that the draft was the basis of the agreement, and then they produced Stansfield,

or Stansfield appeared, and he testified that he was a German lawyer and he had drafted it—

Mr. Boland: Your Honor, I am coming to these things. I wish Mr. Burling would let me handle the case in my own way.

Mr. Burling: Counsel's questions are contrary to the facts.

The Court: I will let counsel state his own hypothesis.

Mr. Burling: This question is contrary to his own hypothesis. Their witness testified that Hachenburg prepared the draft as a result of a conversation with Fritz von Opel, and as a result of the draft, Wronker-Flatow, or Stansfield wrote it.

The Court: I won't take time to check the whole record now. You can argue later that it is not applicable. What he wants to know is if Mr. von Opel in effect misconstrued the technique of this language and had the intent, as he testified, to—

Mr Boland: What effect it has under German law.

The Court: What effect would that have?

2138 The Witness: The mere use of the term "usufruct" by a layman who is not familiar with the law does not necessarily mean that what he intended was to create a right in rem. It might well be that he meant just income as a right in personam and used the wrong term.

By Mr. Boland:

Q. So that with these two things in mind, it might be, under German law, that the courts would interpret the contract as an in personam claim against the son; is that right? A. On the assumption that this was made without the assistance of lawyers, yes.

Q. So that the immediate right in rem comes into play only on the basis that a lawyer drafted the instrument? That is the significance you give to that one assumption that a lawyer drafted the instrument; is that right? A.

I attach significance to that assumption in interpreting the term "usufruct," yes.

Q. In interpreting the term "usufruct" in this gift agreement? A. Yes.

Q. The fact that a lawyer drafted the agreement? A. Yes.

Q. Now, I would like to add one more element, and
2139 I now quote from the cross examination of Fritz von Opel at page 825 of the record. In stating his discussion with Dr. Hachenburg and what was actually discussed with the Doctor, between Fritz and the Doctor, during the course of this proceeding on cross examination, he stated as follows:

"And I also repeated what in effect my father wanted, not in legal language, and, for example, my father, the words my father told me, he said: In Paris you find the doorman in front of your door which ten or fifteen years before is a rich price, and now, all of a sudden, these princes are waiters or taxi drivers, or doormen, and my father wasn't sure what was going to happen in Germany, and so he told me if the day should arrive where he had to flee Germany, and where I might arrive in a foreign country, maybe with nothing in my hand but a paper bag, I then want some legal hold on income, and you at the time might be dead, and I might have to fight it out with your family, and so even if you are alive I want some legal strings, and if I have to appear as a begger and ask you for money, I want some legal strings so that I can legally obtain what is due to me, and these words I explained to Dr. Hachenburg, and he put them into legal language, and the result
2140 is this gift agreement."

Now, let us take the testimony of the father, the donor, and the testimony of the donee and put the two things together and take the gift agreement. Does that shed any light by way of interpretation? A. No, it does not shed any additional light.

Q. We are just where we were before? A. Yes.

Q. Now, let us take the testimony of Dr. Stansfield, at page 118 of the record, on questioning of Mr. Burling—

Mr. Burling: What page?

Mr. Boland: 1188.

Mr. Burling: You said 188.

By Mr. Boland:

Q. Mr. Burling's question is:

"I wish you would give us an idea of what he said to you," Mr. Burling referring to what the father, Wilhelm von Opel, had said to Wronker-Flatow.

"Answer: He said he wanted to protect this part of his family, his son, to have something for him that would take care of Fritz, who had been removed from his position in industry and so on.

"Question: That is not in response to my question.

"Answer: You will be good enough—you are ask-
2141 ing me—

"Question: I want to know the substance of what Wilhelm said to you about a usufruct.

"Answer: And in that connection, as I just now said, although he was taking care of Fritz, he at the same time wanted to protect himself in case Communists or Nazis should take over, or in case of all kinds of contingencies that nobody could definitely specify at that moment. So he wanted to have a possibility of going to Fritz and saying, 'Now, I want a usufruct, and here'—and didn't have to beg for it.

"Question: So you put a usufruct into the terms of the agreement, is that correct?

"Answer: That is correct.

"Question: You used the following language, did you not:

"'The usufruct in the shares is no assigned to Fritz von

Opel, it remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the survivor of them * * *'.

"When you drafted those words, what did you think their legal significance was?

"Answer: This would give Mr. von Opel and Mrs. von Opel the right any time to ask Fritz von Opel to create a property right."

2142 Now we have what the lawyer who drafted the instrument said. Does that shed any light? A. He says that he cast the intentions and wishes of the parties into a legal form which would give the parents a property right, which is a right in rem in the corpus of the gift.

Q. Is it your testimony, Miss Schoch, that on the basis of those three statements the donor, the donee, and the person—the lawyer—who drafted the instrument, plus the gift agreement, itself, a German court would hold this entire contract void because, in fact, a right in rem was not established immediately? A. It might.

Q. It might? A. It might, yes.

Q. Have you any authority for that? A. Just the authority of section 139 of the Civil Code.

Q. What is that a definition of? A niessbrauch? A. No; that is the definition of a void transaction when one of its elements is void.

Q. Have you ever heard of the theory of conversion? A. Yes.

Q. Would that have a bearing on this? A. It has a bearing on this insofar as it is consistent with the intent.

2143 Q. I think it might be well for you to explain to the Court what the concept of the theory is. A. The theory is that if consistently with the intent of the parties and the agreement that has been made, you can interpret the agreement in such a way that it is valid, you may do so.

Q. My question now is, would that have any effect under such a set of circumstances as I have given you: the testimony of the donor, the donee as to what the father intended, and the lawyer who drafted the instrument as to what he intended, plus the gift agreement? A. Well, I think these facts or those assumptions might lead the Court to hold that the gift was void—was valid, even though the right in rem was not immediately created, but that either what was intended or what the parties would be assumed to have intended was a future creation of a usufruct.

Q. Would you venture an interpretation, under such a set of circumstances, as to whether it might be an in personam claim; and under the three possible interpretations that Dr. Kronstein gave, would you say that under such circumstances it might be that the Court would apply one of those three interpretations? A. I would say this: I would say that the Court might interpret this as an obligation to establish a right in rem. I cannot see
2144 that the Court could interpret it as a mere right in personam—that is, a mere monetary claim.

Q. That is because the lawer drafted it—

The Court: She thinks the weight of the evidence is that way, I suppose.

By the Court:

Q. Isn't that what you mean? A. I think the fact that a lawyer drafted it was one of the elements.

By Mr. Boland:

Q. I think you already testified that assuming a lawyer had not drafted it and that Wilhelm von Opel had used this term not knowing it was a word of art— A. Then it might be a right in personam.

Mr. Burling: I move to strike that. Wilhelm von Opel has personally testified, through depositions, that he based his work on the work of the most eminent lawyer in Germany.

Mr. Boland: We are coming to him very shortly, Mr. Burling, if you will bear with me.

The Court: I understand that is your contention. It is quite hard to tell exactly what state of facts a German court would arrive at without seeing the witnesses or hearing cross examination. That is the difficulty. I think he said quite plainly that this obviously—that if it did become obvious to the German court that this language right
2145 here was language which was mistakenly used by the lawyer, and that after having a full and complete explanation made by both of these parties that they had mistakenly put that in there, and that Mr. Wilhelm von Opel had completely misunderstood the meaning of that, then it would have a very material bearing on the question whether a right in rem was created or was not.

On the other hand, I think that perhaps she thinks the German lawyers would not have made such a mistake.

By the Court:

Q. Am I correct about that? A. I am not quite sure whether I understood the last statement you made.

Q. I think you are holding to the view that those German lawyers would not have made such a terrible mistake—isn't that what you mean—having put in their understanding? A. Yes; I think a German lawyer using the term "usufruct" and providing for a usufruct knows what he is talking about.

Q. I know he knows what he is talking about. But if those people told what Mr. Boland has assumed they told him, they would not have written that down? A. If they told him this, he would have told them the way in which

to give them protection or to do what you want
2146 to do.

The Court: We are saying the same thing. That is the difficulty I have. I think you have gotten it correctly. I think the assumption that Mr. Wilhelm von Opel had definitely and unequivocally in his mind that he simply wanted to create the right he said he did when he gave his facts, and these lawyers translated that and put it into words that had a different significance—

Mr. Boland: The lawyer testified in this case.

The Court: I know. (Continuing) I think that is bad. But she has testified that that is unquestionably so, and that a German court would hold that that would be a right in rem.

The Witness: Yes, but—

By the Court:

Q. I know your "but" side. But the other side is that if these brilliant lawyers had been told what he wanted, they would not have drawn such a silly thing in there; and therefore Mr. Wilhelm von Opel did not tell them that. A. I am not trying to assume he did not tell them that, but I assume they told him and explained to him that the way to do it was by way of usufruct, and therefore they adopted the usufruct device.

The Court: All right.

By Mr. Boland:

2147 Q. Now, yesterday Miss Schoch, Mr. Burling asked you the following questions, at page 2045:

"Question: Do you see anything in the Hachenburg papers which indicates that it was the intent of the parties

to obtain a right, an in personam claim for income, coupled with the right that they could at same point in the future, if they felt like it, create a usufruct in order to secure that claim?"

Your answer: "No, I cannot read that interpretation from the Hachenburg papers."

"Question: Do you see anything in the papers—in the Hachenburg papers—where Hachenburg said anything about such an intent?"

"Answer: No."

"Question: Are the Hachenburg papers consistent or inconsistent with that hypothesis?"

"Answer: I think they are inconsistent."

You testified further, at page 2085, as follows:

"Under a gift agreement, which is Exhibit 5, the usufruct did not come into being because the reassignment of this delivery was not put in, was omitted."

Do you remember that testimony? A. Yes.

Q. Let me clarify that. The quotation at page 2085 was not in connection with the Hachenburg papers. A. 2148 Oh, I see. I did not quite see the context.

Mr. Boland: I will show the context shortly. May I have Plaintiff's Exhibit 8, Mr. Yates?

(The deputy clerk handed a paper to Mr. Boland.)

By Mr. Boland:

Q. Now, I show you Plaintiff's Exhibit 8, which has been referred to as the Hachenburg draft, Miss Schoch. A. Yes.

Q. I think we all recognize that Dr. Hachenburg was an outstanding and leading lawyer in Germany; is that not true? A. He certainly was.

Q. We have all agreed to that. Now, if the parties,

Miss Schoch, had actually signed this draft—if the parties had actually signed this draft—would there have been a valid gift under German law? A. Yes.

Q. Do you find any words on reconveyance into joint possession in this draft? A. No.

Q. How do you explain that? Why is it valid? A. The gift is valid because the title to the shares was validly assigned from the donor to the donee.

Q. As in Exhibit 5? A. Yes; and there is nothing that I can see in this draft which, if the draft were signed
2149 by the parties, would make it invalid.

Q. In other words, it is your interpretation of the Hachenburg draft that Dr. Hachenburg did not intend to create an immediate right in rem; is that right? A. Yes.

Q. Why do you come to that conclusion? Will you point out the language? A. Section 2: "Donors reserve to themselves for life the usufruct in three quarters, i.e., in par value, reichmarks 4,500,000 of the donated shares. The balance of reichmarks 1,500,000 is exempt from the usufruct. Donors' usufruct expires at the death of the last parent."

Q. From that language, you would state that it is clear that Hachenburg did not intend an immediate right in rem; is that right? A. It is clear to me, because I am convinced that Dr. Hachenburg, if he had intended immediate creation of a right in rem, would have put in the words of reassignment.

Q. Miss Schoch, would you direct your attention to the first paragraph on the second page of Plaintiff's Exhibit 5 and read that aloud, please? A. "The usufruct in the shares is not assigned to Fritz von Opel; it remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them.

However, 20 percent of all dividends and interest
2150 received will accrue to Fritz von Opel."

Q. What you just read from was Plaintiff's Exhibit 5; isn't that right? A. Yes.

Q. Would you explain to me how you can say that if the Hachenburg draft, on the basis of—

Well, let me ask you this: Would you say that the language you have quoted from the Hachenburg draft in Plaintiff's gift agreement, Plaintiff's Exhibit 5, was similar in nature? A. Similar, yes.

Q. What is the distinction between the language in Plaintiff's Exhibit 5 and Plaintiff's Exhibit 8, the Hachenburg draft, which leads you to the conclusion that if Hachenburg's draft had been signed, even though there were no words of reassignment, it would have been valid, and Wronker-Flatow's draft, that was signed, is void because it intends an immediate right in rem which was not in fact created? Take your time and speak slowly, so that we can understand it. A. The different conclusion to which I come is not based on this specific paragraph but is based on the entire Hachenburg draft. It is based on the fact that the Hachenburg draft spells out a device for bringing the usufruct, which he has in mind, into being by way of the holding company.

Q. So you testified, did you not, to my question,
2151 when I asked you the question, that you could not point out language in the Hachenburg draft which shows that if this agreement had been signed, it would have been valid without words of reconveyance, as distinguished from Plaintiff's Exhibit 5? You read a paragraph which is quite similar and practically identical to the language in Plaintiff's Exhibit 5, did you not?

Mr. Burling: The witness also testified that the holding company provisions are in—

Mr. Boland: She just added that. I think we can go back and have checked in the record exactly what the question was.

By Mr. Boland:

Q. The question was, Would you point out to me the language by which you state that Hachenburg did not intend an immediate right in rem?

Mr. Burling: If Your Honor please, the witness then said it was because of the holding company provision which is in Plaintiff's Exhibit 8.

Mr. Boland: I agree, Your Honor, that the witness just added that; but I would like to know if she did not answer my question by pointing specifically to this reservation language.

Mr. Burling: If Your Honor please, the record is the best evidence of that. My recollection of what took place 30 seconds ago is that a particular paragraph was shown, and she was asked, "Is this similar to what is in the—"

The Court: I heard her say that.

2152 By the Court:

Q. You go ahead and give your interpretation of that. What is the language that makes the difference? A. Well, there are certain differences. For instance, Exhibit 5, the fifth of October agreement, speaks of the usufruct, meaning the usufruct in the entire corpus of the gift; whereas the Hachenburg draft provides for usufruct in 75 percent of the stock only. That is, he gives the parents usufruct in 75 percent, not the entire.

The agreement of October 5 gives Fritz von Opel 25 percent of all dividends and interest received, which to me looks rather like an in personam right of Fritz von Opel against his parents. That is what the October 5 agreement—

By Mr. Boland:

Q. Looks like an in personam right? A. A right of Fritz von Opel against his parents for 20 percent; whereas the Hachenburg draft clearly would establish usufruct in 75 percent.

Q. Of course, it is clear from the first page that it could not be an in personam right on behalf of Fritz von Opel against his parents, I take it; is that right? A. No, not at all.

Q. In other words— A. If they reserve the entire
2153 usufruct to themselves and give him only a claim for 20 percent of the income, which they are prepared to do, then—

Q. I see. Have you finished explaining why if Dr. Hachenburg's draft had been signed there would have been a valid agreement? A. Well, I think I have explained it.

Q. Even though words of reassignment are not there? A. Yes, because the Hachenburg draft, other than the October 5, agreement, makes it clear that the usufruct is to be created in the near future through the holding corporation device, and the Hachenburg draft spells out the manner in which the usufruct is to be created.

Q. If you will take Plaintiff's Exhibit 5 and Plaintiff's Exhibit 8, Miss Schoch, and read the two of them and compare the two of them, do you think it would be reasonable to assume that the lawyer who drafted the final gift agreement, Plaintiff's Exhibit 5, on the assumption that he had before him Plaintiff's Exhibit 8 at the time he drafted it—that he in effect was using the language of Dr. Hachenburg, which appears in the first paragraph under section 2, I believe?

Mr. Burling: If Your Honor please, I think we could save a great deal of time. The defendant's contention primarily is just exactly, I think, what Mr. Boland is now asking. We contend that the gift agreement which was
2154 actually signed is merely a provision of the Hachenburg draft. We get into this point of total conveyance at the outset ab initio, only if it is contended that the Hachenburg draft was disregarded and some other document substituted by Wronker-Flatow. If my friend will

concede, as he now appears to be saying, that the Hachenburg draft is the basis—

Mr. Boland: Not necessarily. We will concede that Wronker-Flatow had the Hachenburg draft before him at the time he drafted the instrument. We will also concede that in the course of preparing this, and prior to that time, there was a memorandum of fundamental considerations which basically set out the ideas, which was also before Wronker-Flatow, perhaps in advance of the date on which he drafted the instrument.

I do not think there is much trouble there. You will see my point in a minute, Mr. Burling.

By Mr. Boland:

Q. Is it reasonable to conclude that the language in the first paragraph of section 2 came from—pardon me; the language of the first paragraph of page 2 of Plaintiff's Exhibit 5 came from the first paragraph of section 2 of Plaintiff's Exhibit 8? A. Yes.

Q. Is it usual, Miss Schoch, under German law, to use the term, "the usufruct is reserved"? If you were writing a usufruct provision, would you use the word "re-
2154 reserved"? A. That term is quite often used in Germany.

Q. You do not think that lends any uniqueness to it? A. No, not at all. A gift with usufruct reserved is quite usual.

Q. Let us assume the following fact: Assume that the father and son came back—came to Wronker-Flatow—for the purpose of entering into a final gift agreement on October 5, 1931; that having received the draft, Plaintiff's Exhibit 8, from Dr. Hachenburg, there was discussion about it; and that Wronker-Flatow, being the attorney at that time, stated, "The important thing is speed. The important thing is speed. Let us get this accomplished"; they then finish discussing the holding company; the father is

not sure about the holding company; and there is some discussion; but, at any rate, Wronker-Flatow says, "Let us forget the holding company. You can work out an arrangement along that line later on. The important thing is to make a gift."

On that assumption the parties took Hachenburg's draft and deleted the provisions concerning the holding company.

The German court, having the intent of the parties before it, such as I have given you—the statement of the lawyer who drafted the instrument and the Hachenburg papers before it, plus this gift agreement—in your opinion, would the German court hold that gift agreement void?

A. No. I think I have testified to that effect yester-
2156 day.

Q. You think they would hold it valid? A. Yes.

Q. Assuming they would hold it valid, how would the instrument be interpreted under these sets of conditions I have given you: the testimony of the father, the testimony of the son, the testimony of the lawyer who drafted the instrument, and the stipulation that the Hachenburg papers were drafted in connection with the gift agreement and actually present before Wronker-Flatow when he drafted this instrument? How would you interpret the first paragraph on page 2 of Plaintiff's Exhibit 5? A. The first paragraph?

Q. On page 2 of Plaintiff's Exhibit 5. A. On page 2?

Q. Of Plaintiff's Exhibit 5, I think, which is usufruct.

A. Oh, yes; usufruct.

I think I explained in my testimony yesterday, in the light of the Hachenburg agreement, I would interpret this usufruct clause as a provision for a usufruct to be established.

Q. In the future? A. In the future.

Q. Is it true that under such circumstances actually the legal effect of such interpretation would be an in

personam claim of the father and mother against
2157 the son to establish a usufruct in the future? A. That is right.

Q. And that if the intent of the parties was given any weight, it would be interpreted as to be created at a time when the family was in distress or distressed financial circumstances? A. No.

Q. No! Not necessarily? A. No, because that intent is in no way spelled out either in the Hachenburg draft or in the instrument itself.

Q. Would the fact that the father was independently wealthy—and let us assume, taking his capital alone and disregarding his income, that it would take over 250 years to spend the capital at the rate he lived, without touching the income, would that fact be given any weight in the German court in interpreting this contract as to its validity or voidness?

Mr. Burling: You are also assuming that the property being given was exchangeable into foreign exchange, so that it would be somewhere other than in Germany?

Mr. Boland: I am talking about his German property.

The Court: He is trying to get at the fact that the father needed money for any particular use.

Mr. Boland: The fact that he did not need any money.

The Court: The fact that he did not need any
2158 money for any particular use.

The Witness: I do not think so, because why would they make that provision? Why did the father want this usufruct?

By Mr. Boland:

Q. That is the very question I have in my mind, Miss Schoch. Here is a man who is independently and on his own very, very wealthy. As far as he can see, unless someone comes in and takes over all his property and assets in

Germany, he is never going to have to call upon his son for any money.

Therefore, it seems to me a question might well be raised in the German court as to what is the meaning of 80 percent? Would the father really want 80 percent of the income from the time of the gift agreement of October 5, 1931?

Mr. Burling: I feel, if Your Honor please, that if we are going to have assumed facts in a particular case, then the witness should also be asked to assume the remaining facts, which were testified to by Fritz von Opel, Wilhelm von Opel, and Wronker-Flatow, that the father was constantly obsessed with the idea that Russian Princes had become taxi drivers in Paris and that he might have to flee Germany.

The Court: You can ask her about that hypothesis on redirect.

Mr. Boland: I do not think she has the point.

The Court: I think she has.

2159 The Witness: Maybe I have not; I am not sure.

By the Court:

Q. He wants to know, assuming all those facts you have been assuming—the two papers drawn by the two different lawyers and all the circumstances that have been related by him in his question, and the testimony of the father and son, and so forth—he wants to find out, if that matter came into court, would the financial status of the father have any bearing on the interpretation? A. I do not think so; it would have no bearing on the interpretation of a right in rem which is to be created by a holding company.

By Mr. Boland:

Q. You do not think, then, that under German law the fact that the donor was independently wealthy would have any bearing in interpreting whether or not the intent, as

stated in this gift agreement, was for an immediate right in rem or for a future right in rem? Don't you think that that would be given some consideration? A. All depending on the remainder of the facts and on the entirety.

Q. We have already come to the conclusion—without that, we come to the conclusion—that what the intent was was to create a usufruct in the future—at some time in the future. A. Well, I think I said a little more
2160 than that. I think the intent, in the light of the Hachenburg draft, was to create a usufruct in the near future.

Q. And therefore the contract was not void? A. No, it was not void. I am not talking about invalidity; I am now talking about the intent of the parties and the purpose of this usufruct clause; and the fact that Dr. Hachenburg elaborated the holding corporation device for the realization of the usufruct seems to me to point to more than a mere something that was to happen in the remote future, when the father might become destitute.

I just cannot see the transaction in the light of those drafts otherwise than as a very definite plan for the near future. The transfer of the Opel shares that were in New York, the holding corporation, and the various provisions spelled out by Dr. Hachenburg—in the light of those I think the fact that the father at present was a rich man did not make much difference in Germany.

Q. I want to see how far you go in this. Taking the gift agreement alone, Plaintiff's Exhibit 5, Hachenburg's papers, Plaintiff's Exhibits 8 and 9, I believe—on those two things alone, on the basis of the Hachenburg papers, so called, and Plaintiff's Exhibit 5, is it your testimony that the Court would interpret the gift agreement as a right to call upon the donee in the future to establish a
2161 right in rem? Is that your interpretation, without more? A. Yes.

Q. It is. A. Yes.

Q. Then, under German law—that is, even without in-

tent of the parties being present, but on the basis of this —you would conclude that the parties intended to create a right in rem in the future?

Mr. Burling: May I ask counsel to state when the future is? 12 o'clock is in the future—12 o'clock today. So is the millenium in the future.

Mr. Boland: That is exactly what I am getting to. You just bear with me. I am sure I see this picture as well as you.

The Court: You can ask her on redirect.

By Mr. Boland:

Q. On the basis of the Hachenburg papers and the gift agreement, you think it is clear, under German law, that the contract would not be held void? A. Yes. I think I have said that a number of times.

Q. Question No. 2: The parties intended to create a right in rem in the future, without defining the future. Let us say 5 minutes in advance, 10 minutes, or 15. But at least it would not be held void due to the fact it was not created immediately.

2162 Now, isn't it somewhat significant, and wouldn't it be given weight, that the father was independently wealthy and needed no money; that it would take him 250 years to spend what he had now at the present rate of his spending money—and he was 65 or 70 years old, although probably a little younger than that at the time of the gift, but he was in his upper years. Wouldn't that be given weight as to how far in the future? A. Well—

Q. I realize we are dealing with a difficult thing. It is a question of degree. A. It is a question of speculation.

Q. But we are not talking about 5 minutes. A. I would like to point out this: Having before me the Hachenburg papers, and seeing that Dr. Hachenburg has spelled this

thing out, Dr. Hachenburg, of course, realized that the parents did not want the income immediately, which they would have to tender to the German Reichsbank, and which would become reichsmarks, on which they had planned anyway. That is, I think, why Dr. Hachenburg put in the provision that the father was to have the right to vote on this 75 percent of the stock in which he held usufruct, and that he had the right to vote not only on dividends but also on the use to be made of these reserve funds of the holding corporation, so that all the father had to do was to vote that no dividends were to be
2163 distributed, and the net profit of the corporation was placed into a reserve fund, as provided by the Hachenburg draft. In this fund the net profits of the corporation would accumulate for the father, so that in the future, when he had to leave Germany or became destitute, he could draw those funds.

Q. Well, I just have a few more questions, Miss Schoch. Is it usual, under German law, or unusual, or is it unknown, to use the word niessbrauch in respect of securities as a mere right in personam? A. I don't think there is any definite use. I mean the ordinary use of usufruct is to denote a right in rem. It may be possible that nonexperts or lay persons might talk about usufruct meaning a right in personam.

Q. But a lawyer you would not expect to talk of usufruct? A. In the case of a lawyer, I definitely would not.

Q. In preparing your testimony, Miss Schoch, did you consult commentaries on the B. G. B.? A. Yes, I did.

Q. Did you consult the so-called Staudinger? A. Yes, I think I did.

Q. Do you recognize Staudinger as a reliable report on German practice? A. It is one of the leading commentaries on the Civil Code, yes.

2164 Q. Would you translate, please, section 8 on page 832? I direct your attention to that section. Have you read that before? A. Section 8 on page—I don't

know what edition that is. That is the ninth edition of the Staudinger.

Q. It just has a figure 8. A. Yes; this note on 8, page 832, is as follows. This is just an offhand translation.

Q. Yes. A. "The main substitute forms for a usufruct in practical life are the following: A."—

Q. Is there a reference there to Nussbaum? A. There is a reference to Nussbaum.

Q. Do you know what Nussbaum that is? A. Yes, I think I know. Without looking it up, I assume that it is a book by Nussbaum published in 1919, in which he discusses the practical importance of usufruct as an institution in German law.

Q. Is he the same Nussbaum who was at Columbia? A. Yes.

Q. Would you go on, then? A. "If somebody desires to procure to another the enjoyment of the capital, whether it is rested in securities or in mortgage, for life or for some other period of time, frequently the form of the usufruct does not suit him, because it grants to the
2165 usufructary far reaching rights with respect to the capital itself."

Then he refers to section 1077 to 1079 of the Civil Code. Do you want me to read on?

Q. Yes, please, just a little more. A. "The grantor will then prefer to choose the less burdensome form of a mere obligatory agreement—that is, of an agreement for a mere right in personam. Such a mere right in personam may be meant under given circumstances where the parties use the term 'niessbrauch'—where the parties themselves have used the term 'niessbrauch.'".

Again, there is reference to the book by Nussbaum.

Q. Would you not state, as a result of that quotation from Staudinger, that the use of the word "niessbrauch" does not necessarily mean a right in rem? A. I conclude, what I have already said, that the term as used by a nonlawyer might mean in personam.

Q. You think that that book supports what you have already said? A. Yes; but as used by a lawyer like Dr. [illegible]burg, it certainly would indicate a right in rem.

Q. Is Staudinger a report that is used by lay people or attorneys? A. It is a legal commentary, but he does not say who the parties were in the cases or hypotheses.

2166 Q. So would you say that that statement merely bolsters your position that lay people using the word "niessbrauch" might not mean right in rem? A. Well, I could possibly think of a very inexperienced or poor lawyer; but Dr. Hachenburg, in the year 1931, I think, could only mean a right in rem.

Q. Miss Schoch, let us assume that the parties did, in fact, intend to create an immediate right in rem and that, in fact, an immediate right in rem was not established. A. You mean with regard to the usufruct?

Q. Yes. I am referring to Plaintiff's Exhibit 5. Assume, further, that but for the establishment of the immediate right in rem, the donors would not have given the gift. I think that is a glaring example of what was then section 139, as I understood you; is that right? A. Yes.

Q. Would you like me to read this? A. Immediate right in rem is an essential of the gift.

Q. I do not like using "is an essential." A. I mean is the essential. Well, one essential is a gift.

Q. It is a "but for." It seems to me there are many things that can be an essential, but not a "but for the gift."

The Court: You had better ask the question and see if she can answer you that way.

2167 By Mr. Boland:

Q. Assume that the parties did anything to create an immediate right in rem but, in fact, the immediate right in rem was not created. I am assuming a very

strong point. But assume further that but for the establishment of the immediate right in rem, the donors would not have given the gift. A. Yes.

Q. I think that is clearly within section 139, according to your testimony, is it not? A. Yes.

Q. Then, assume that approximately 4 years thereafter all of the parties, realizing that the right in rem had not in fact been established, not only ratify the gift to the son but decided that they did not want anything further to do with the niessbrauch. Would that have any significance under German law? A. Well, we have shown that due to the failure of the usufruct, the gift failed at the time. You want me to assume that?

Q. Well, I want you to draw your own conclusions. I am just stating that. A. For the purpose of discussion, I am now assuming—

Q. I think under your testimony you would have to state the contract would be void; that the usufruct failed.

The assumption of fact is that the right in rem was
2168 not created; it was just not created as a fact. A. All right. If I have no other facts, I would say, assuming it was essential to the gift, and that the gift failed, no title passed at the time from father to son.

Naturally, any time the parties realize the nullity of the transaction they have made, they can, as it is sometimes called, ratify the transaction. A more precise term would be that they can make a new contract; they can make a new gift. That, without anything further, could have been done in this case.

Q. Is that known as confirmation or ratification in German law? A. It is sometimes called ratification, but what is meant is the conclusion of an entirely new agreement, the making of a new gift.

Q. Now, let us assume this: First, that the gift of October 5, 1931, was actually void because the word "usufruct" was used and no right in rem was established.

Now let us assume that in 1935 Fritz von Opel, the son,

made an attempt to establish a right in rem, but that the Opel parents did not accept this usufruct.

Would that have any significance under German law? A. Well, first of all, you state he made an attempt to establish a usufruct, and your theory would be that by the establishment of the usufruct in 1935 the gift
2169 would become a valid gift?

Q. I do not have a theory; I am just asking a question. A. I have difficulty in my assumptions.

Q. Yes. In 1931, October 5, let us assume the parties intended an immediate right in rem and that it was a sine qua non of the gift. Under section 139 of the Code it would be void, because they did not establish it? A. Yes.

Q. Let us assume that in 1934 or 1935 the donee under the gift, having received possession actually and kept possession for 3 or 4 years, actually attempted to establish a usufruct in favor of the parents. A. Yes.

Q. And that the parents did not accept the usufruct. Where would we be by way of legal situation under German law? What effect would that have? A. First of all, of course, disregarding the foreign exchange control factors for a moment, I would say this: First of all, it has to be clear that at the time the son tries to establish usufruct, the parents want to make this gift or to ratify the gift which you ask me to assume was void. If the parents do not want the usufruct—

Q. Let me make one thing clear. I did not ask you to assume that it was void. A. I thought you did.

2170 Q. No. If I did, I am sorry. A. I am sorry.

Q. It would come within the purview of section 139. That is what I said. I did not ask you to assume it was void.

Mr. Burling: Counsel said you would have to conclude it was void under your previous testimony.

Mr. Boland: That she would have to conclude it was void; not I. I am just asking about a set of facts when the case comes before a German court.

By the Court:

Q. That has to be your answer. You assume that would be void under 139? A. Yes. I am talking about the assumption it is void.

Q. Whether it is his assumption or yours, that is what you are assuming? A. Yes; in my answer, I am assuming it is void.

By Mr. Boland:

Q. All right. A. And you want me to assume that the son attempts to establish usufruct; that the parents do not want it—

Mr. Boland (interposing): To the property which he has held since 1931.

A. I see. And that the parents do not want—say they do not want—the usufruct?

Q. Yes. A. Well, the parents are assuming that 2171 they have made a gift to the son?

Q. Yes. A. That they have not been aware that this gift is void or might be void?

Q. That is right. A. They believe they made a gift in 1931?

Q. Yes. A. The son attempts to perform his obligation under the agreement by establishing usufruct, and the parents then declare that they do not want a usufruct?

Q. That is right. A. That would amount to the making of a gift from the parents to the son at the time the parents declared that they did not want a usufruct.

Q. Tell me this, Miss Schoch. I show you what I believe is section 184 of the German Civil Code. Would you just give us the general import of that section? A. Well, it says that subsequent ratification has retroactive effect, retroactive to the time when the transaction was made,

unless other provision has been made—unless something else has been provided for.

Q. Would you say that section 184 has any bearing on the set of circumstances you gave us hypothetically? A. I don't think so.

2172 Q. You don't think it would have retroactive validity? A. I don't think so, because I don't think that what I am talking about is the subsequent consent or subsequent ratification.

Q. Let us assume, now, a set of circumstances where, in fact, the parents knew that the gift agreement with the right in rem had not, in fact, been established, and they knew they had intended the right in rem, but at a later time, but it not having been established, they indicated that that was all right with them. That would be ratification retroactively, wouldn't it? A. No, I don't believe it would.

By the Court:

Q. Is there a difference in Germany law between what is void and voidable? A. Yes; and where you have a void transaction, you can ratify only in such a way.

Q. Can you ever ratify a void one? A. No; you can make a new transaction.

Q. When does it become void? A. It is void ab initio.

Q. Yes, I know. Is that because it has some effect in violation of some law of the realm, or because the parties have made a mistake, or what? A. Well, we are assuming

2173 here that because of the failure of an essential element—

Q. I would think that under American law that would make it voidable—I think. A. Under German law it makes it void ab initio.

Q. Absolutely? A. Absolutely.

Q. There is a difference between German law and American law in that regard, is there? I am giving my impression.

If I draw a contract right now which becomes defective because of some little detail, it does not put the stamp of absolute invalidity on it and make it completely void. It could be voided, of course, and then that would be what we call a voidable transaction. Then we may ratify that later. A. Yes, but where you have a void transaction—

Q. It is void when it is against public morals or against some law or against some exchange. Then it is absolutely void. You can't rewrite it; you have to make a new contract? A. Yes.

Q. Sometimes we say "void" when we mean "voidable." I was wondering in this case here in regard to foreign exchange. But just assume on this October 5, 1931, agreement this failure to put in those words which could readily have been put in occurred. Would that make it absolutely void, so that it could not be ratified; or would it make it void ab initio? A. Yes, it would.

2174

The Court: All right.

By Mr. Boland:

Q. And the donor would not have an opportunity to consider it as a voidable contract? A. He would have to make a new gift.

Q. He would have to make a new gift under that set of circumstances? A. Yes.

Mr. Boland: That is all.

Redirect Examination

By Mr. Burling:

Q. Mr. Boland asked you, in regard to what he was just questioning you about, to disregard foreign exchange regulations. I now ask you to assume that the father and son in 1931 intended to make a gift from the father to the son,

with the usufruct back to the father, and that because of a lawyer's mistake the instrument is defective, the father insisting on the usufruct, and therefore under section 139 of the Code the gift was void, as you have just told his Honor.

Now, will you state whether it would have been possible in 1935 for the father validly to have ratified the gift without a license from the Reich Foreign Exchange Con-
2175 trol, assuming it is a gift which has by now become a gift of foreign securities—to be exact, Swiss securities? A. A gift of foreign securities or any assignment of foreign securities required a license under German foreign exchange control.

By the Court:

Q. It would not make any difference whether it was a ratification or a new contract? A. No.

By Mr. Burling:

Q. Supposing, however, that the father and son do not know this in 1935, or are misadvised by counsel, and they go through with a purported ratification; and again, more specifically, the son tells the father that he is trying to set up a usufruct, and the father says, "I reject the usufruct. I do not want anything to do with it."

Now, would the purported ratification in 1935, which was without a license, be valid or void? A. It would be void under German law.

Q. Coming to another topic: I ask you to assume that in 1931 I am a very rich German. I have an estate of perhaps thirty-five or forty million marks, including property which I can sell to General Motors for fifteen million marks. Supposing that in all good faith I give my son the property,
which he can sell to General Motors for fifteen
2176 million marks. Supposing that thereafter an economic catastrophe happens to me, and I become pen-

niless. Do I have any legal right under German law against my son, either that he should support me or that I can recover back the gift? A. Under German law the children are under a legal obligation to support their parents.

Q. Is that support at subsistence level or at a level equal to what is referred to in German law as the social status of the parents? A. This support—of course, within the limits of the ability of the children—has to be at the accustomed standard of living of the parents—that is, in accordance with their economic and social status.

Q. So under my hypothesis, if I have given my son 15 million marks, and if I live reasonably simply, I can require him to support me in the way I have been living; is that right? A. Yes, that is right.

Q. Is there also any provision with respect to a donee? In other words, suppose, instead of giving it to my son, I give you 15 million marks, and I become penniless. Do I have any rights against you? A. There is a provision in German law concerning gifts that a donor who becomes destitute may revoke a gift he has made.

2177 Q. So, going back to Plaintiff's Exhibit 5, on the assumption I shall give you, that all that Wilhelm and Marta von Opel intended was to reserve a claim for income against the possibility that they might become penniless, they would not have had to put any provisions whatever in the instrument in order to secure that legal right? A. Yes, they were secured by these two rules of the German law.

Q. In other words, on the assumption which has been stated in this courtroom, that all Wilhelm and Marta von Opel wanted was protection, all of the words relating to usufruct are totally useless; is that correct? A. Well, unless they wanted some additional protection; I don't know. But they certainly have the protection of those—

Q. Well, I am asking you now to assume, Miss Schoch, the contrary; that if they became penniless, they could then

look to Fritz von Opel for support in their old age? A. That is right.

Q. On that assumption, all those words that have been argued about for so long are totally meaningless or totally useless? A. Yes.

Mr. Burling: That is all.

2178 *Recross Examination*

By Mr. Boland:

Q. Assuming, on the other hand, Miss Schoch, that the parent Opel was not aware of the legal right of the son to provide for him in the event of destitution, and assuming that it was his very purpose to take care of himself in his old age, or if he found himself without any more money, then, on that assumption, might the German court conclude that there was no purpose of the usufruct and, therefore, no problem involved, and that Fritz von Opel got an absolute, clear title, with no charge on the usufruct? A. Well, you are assuming that he or his son did not talk to a lawyer; and if you go to a lawyer in Germany and tell him, "I want some protection for my old age; I don't want to be penniless," any lawyer would have told you, "Well, your son"—

Q. Well, assume—

Mr. Burling: May the witness finish?

The Court: Let her finish.

By the Court:

Q. Had you finished? A. No, I had not finished the sentence. I said any lawyer would have pointed out that (a) he could revoke the gift; and (b) his son would be under a legal obligation to support him.

2179 Mr. Burling: I would like to hear the witness.

Mr. Boland: I know you would. There are many instances when we would like to hear our own.

By the Court:

Q. I do not know whether you are an expert on the conflict of laws proposition or not, but would this make any difference—this obligation to support a family—in the German law would it make any difference as to where the son would be or where the donee would be as to whether or not that could be enforced? A. Well, I think that that might make a difference.

Q. In other words, usufruct might be of some assistance if he is in a foreign nation, whereas it would be entirely unnecessary if he was in Germany? A. It would be entirely unnecessary if he was in Germany.

Q. And it might be necessary if he was in a foreign country? A. I think any country; at least on the European continent, provides for the duty of children to support their parents, so I do not see much difference what law you apply.

Mr. Boland: That was my next question, Your Honor, about property being in a foreign country. I will just let her answer go. That is all.

(The witness left the stand.)

2180 The Court: Have you a witness whose testimony will be short, Mr. Burling?

Mr. Burling: If your Honor please, we do not intend to call any further witness, unless the Swiss witness who is here testifies about the books, in which case we may call a European accountant.

The Court: Is the Swiss witness here?

Mr. Gallagher: He is, Your Honor; he is right here in the courtroom.

The Court: Will he be a witness who will take a long time?

Mr. Gallagher: I imagine he probably will take long.

The Court: You could not get through with him in 5 minutes?

Mr. Gallagher: No, indeed.

The Court: Then, I will recess until 2 o'clock.

(At 12:25 p.m. a recess was taken until 2 p.m. of the same day.)

2181 AFTERNOON SESSION

(The proceedings were resumed at 2 p.m., at the expiration of the recess.)

Mr. Burling: May I briefly address the Court? I may have made a mistake. Just before the luncheon recess I said we had no more witnesses. I meant we had no live witnesses. We do have one deposition we wish to read: However, I would suppose, subject to my friend's convenience, that we would finish this afternoon. I have every expectation of it.

Mr. Gallagher: I believe we can do that with Mr. Burling. We will only be too glad to cooperate. I have a request to make of the Court. We have two brief rebuttal witnesses who have arrived from New York and whom I did not expect to call until tomorrow morning, but they requested that I address the Court and ask that they be permitted to go on now, because they have to leave at 5 o'clock. One is on the Board of Education in New York and the other is an auditor.

The Court: That is all right.

Mr. Burling: May I inquire the names of the witnesses?

Mr. Gallagher: Yes; Mr. Clauson and Mr. Bayer.

Thereupon—

2182 ANDREW G. CLAUSON, JR., was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. Will you state your full name, please? A. Andrew G. Clauson, Jr.

Q. Where do you reside? A. I reside in Staten Island, New York.

Q. Where were you born, Mr. Clauson? A. Staten Island, New York.

Q. Will you state where you were educated? A. I was educated in the elementary and secondary schools in New York. I am a graduate of Packard Commercial School, and I attended New York University and have a professional degree of Certified Public Accountant from the University of the State of New York.

Q. Did you serve in the First World War? A. I did.

Q. Were you an officer? A. Well, I enlisted as a second class seaman. I was relieved of active duty in 1919 as an ensign in the pay corps.

Q. During the present war did you hold any position? A. I was a member of a local draft board in Staten

2183 Island.

Q. Do you have any children? A. I have two.

Q. Did they serve in the service of the armed forces during the war? A. They did; both in the Navy.

Q. Both boys? A. No; boy and a girl.

Mr. Burling: To speed things up, I will admit this gentleman's moral qualifications.

Mr. Gallagher: Thank you, Mr. Burling. I just wanted to bring a little of his background out.

By Mr. Gallagher:

Q. Now, have you held any public offices during your lifetime, Mr. Clauson? A. Yes.

Q. Do you presently hold a public office? A. I do.

Q. Will you state what that is? A. I am president of the Board of Education of New York City.

Q. Would you state when you were first appointed to the board? A. I was appointed January 1, 1945, by Mayor LaGuardia. I was reappointed April 1, 1947, by
2184 Mayor William O'Dwyer.

Q. When were you first elected president of the board? A. In May, 1946, re-elected in May of 1947, and elected for my third term in May of '48.

Q. Now, directing your attention to your accounting experience, when did you commence the work of accounting? In what year? A. Well, I went with Haskins and Sells I think in the winter of 1919, right after leaving the armed services.

Q. And how long did you stay with Haskins and Sells? A. I stayed with them until May of 1924.

Q. Then with whom were you associated? A. Then I became comptroller of a banking corporation in New York City and stayed there until the end of 1927. The year 1928 I was comptroller of the United Wallpaper Factories. On January 1, 1929, Mr. Bayer and I formed the firm of Bayer and Clauson, and we are still partners in it.

Q. Do you know Mr. Fritz von Opel? A. I do.

Q. When did you first meet Mr. Fritz von Opel? A. I believe it was in the fall, possibly October or November, of 1931.

2185 Q. During the succeeding years has your firm represented Mr. von Opel or the Uebersee Finanz-Korporation or any interests which that corporation has? A. Our firm has been accountants and auditors for the American owned and controlled company of Mr. von Opel since that time and up until 1942, I believe it was.

Q. I might ask, do you have any honorary degrees, Mr. Clauson? A. I have an honorary degree of doctor of laws.

Q. Now, in connection with your representation of these companies in which Uebersee or Mr. von Opel has an interest, can you state whether or not there was any breakdown between you and Mr. Bayer or your men with respect to which companies you worked on? A. Yes. Mr. Bayer and I had general control of our practice—always have—we still have—but for the division of work, I looked after the Spur Distributing Company at Nashville and the Harvard Brewing Company in Lowell, Massachusetts, and Mr. Bayer usually looked after the companies down in Shreveport, Louisiana, plus the fact that Mr. Bayer usually looked after the tax work.

Q. Have you served as a member of the board of directors for Spur Distributing? A. I did for a few years.

Q. Were you on the budget committee for the
2186 Harvard Brewery? A. I was.

Q. Do you know a Mr. Theodore Hoffacker, or did you know him? A. I do—I did know him.

Q. Do you know a Dr. Hans Frankenberg? A. Yes, I do.

Q. I will ask you, Mr. Clauson, did Mr. Hoffacker ever tell you that he represented Wilhelm von Opel? A. He never did.

Q. Did Dr. Frankenberg ever tell you that Wilhelm von Opel owned Uebersee and these other companies indirectly? A. No.

Q. Did Dr. Frankenberg ever tell you that he was Wilhelm von Opel's agent? A. No.

Q. Did Fritz von Opel ever tell you that these properties on which you were working were the properties of his father? A. No.

Q. Will you state to the Court who you have always believed was the owner of the Uebersee Finanz-Korporation and the shares of Spur, Harvard, and the other

corporations on which you did auditing work? A.
2187 I have always believed that they belonged to Mr. Fritz von Opel and/or Uebersee Finanz-Korporation.

Q. If any of those people whom I have mentioned or if anybody else had mentioned to you the fact that Wilhelm von Opel owned these properties or that Dr. Hans Frankenberg was Wilhelm von Opel's agent, do you believe you would have remembered that? A. Definitely.

Q. And so it is your impression, if I understand it, that Fritz von Opel and/or Uebersee always owned the properties in question? A. That is correct.

Mr. Gallagher: That is all.

Cross Examination

By Mr. Burling:

Q. You are an accountant, are you not, sir? A. I am.

Q. Yet you never laid eyes on any book of account of Uebersee Finanz-Korporation; is that right? A. That is correct.

Q. Will you state when and exactly what was said to you and by whom as to the ownership of Uebersee Finanz-Korporation? A. Well, that is a little hard to answer just that way, isn't it?

2188 Q. Yes, it is. A. My first connection, I suppose, was in the fall of '31, when Theodore Hoffacker, for whom we had done some work, introduced me to Mr. von Opel.

Q. And what was said to you by Mr. Hoffacker or von Opel in 1931 as to who owned the shares of Uebersee Finanz? A. At that time—I don't believe anything was said about Uebersee. At that time it was a question—

Q. Let us come to the year 1932, then. A. Well—

Mr. Gallagher: Just a moment, Mr. Burling. I think the witness should be permitted to answer. Now, you were granted that concession.

Do you have anything further to state in response to that question?

The Court: Do you have anything to say in answer to that other question?

The Witness: No.

By Mr. Burling:

Q. We come to the year 1932. State just exactly what was said to you, in so far as you remember, by whom, and where it took place, about who owned the shares of Uebersee Finanz-Korporation in the year 1932. A. The information came to me from Mr. Hoffacker that
2189 Mr. Fritz von Opel had acquired controlling interest in the Spur Distributing Company and that he, Hoffacker, would like us to go to Nashville and make an audit of the books of the Spur Distributing Company.

Q. Hoffacker told you Fritz von Opel owned the shares; is that right? A. Said that Fritz von Opel had acquired the controlling stock of the Spur Distributing Company.

Q. As an accountant, sir, you will admit that I might acquire the controlling stock of the Statler Hotel Company for a client? A. That is right.

Q. And yet not own it myself, will you not? A. That is true.

Q. Was anything told you about who owned the beneficial interest, the real interest, in Uebersee? A. Fritz von Opel.

Q. Who said that? A. Mr. Hoffacker.

Q. When? A. Well, it might have been any time from October thirty-one on.

Q. Will you fix the year, please? A. Pardon me?

Q. Will you fix the year? A. It is hard for me
2190 to fix the year, because I first met Mr. von Opel, or, at least, we were called into the situation, in the

fall of 1931, at which time Hoffacker undoubtedly said that Mr. Fritz von Opel had acquired interest in various companies, including Spur Distributing Company.

Q. And you understood, of course, that he had the beneficial interest in it himself? A. Naturally, that is correct.

Q. And he said that again in 1933 and 1934 and up to June 5, 1935, didn't he? A. He said it right along; I don't know why June 5, 1935.

Q. I will come to that. A. All right.

Q. Now, are you aware that Fritz von Opel made an affidavit and swore on his oath that he had nothing but the bare legal title to the shares of Uebersee— A. No, I do not.

Q. May I finish my question? A. Yes, indeed. Sorry.

Q. Are you aware that Fritz von Opel—By the way, he is the man sitting at this table? A With the paper in front of him, that is correct.

2191 Q. Are you aware that he swore on his oath that he did not have the beneficial interest, but that the beneficial interest was in Wilhelm von Opel and that he swore that oath on June 7, 1935? A. I don't know that.

Q. Are you aware that that affidavit was filed in the United States District Court for the Southern District of New York? A. I am not aware of it.

Q. Are you aware that the record containing that affidavit went to the United States Circuit Court of Appeals for the Second Circuit and that the case was argued by John W. Davis? A. I am not aware of it.

Q. You have no knowledge of that? A. Not of that affidavit, no, sir.

Q. You are aware that a lawsuit was brought, are you not, by Uebersee to obtain permission to export $1,250,000 in gold? A. That is true. I knew that there was a suit pertaining to gold, but as to the details, I know nothing about it.

Q. I am not speaking of details, sir. Didn't you know that the contention was that the gold—

Mr. Gallagher: Just a minute. I submit that is
2192 a detail.

Mr. Burling: I submit that the main basis of the suit is not a detail.

The Court: If he knows about it, it is proper cross examination.

By Mr. Burling:

Q. Did you not know that the interest of Uebersee—that is, here and there—Uebersee—that the basis of the gold was beneficially not owned by Fritz von Opel but was owned by Wilhelm von Opel, his father? A. I did not know it.

Q. Although you were the accountant for the firm, you had no knowledge— A. We weren't the—

Q. Let me finish. A. I am sorry.

Q. Although you were the accountant for the firm or for the company, you did not know what the basis of their gold case claim was; is that correct?

Mr. Gallagher: Just a moinent, Your Honor.

The Witness: Accountants to what company?

Mr. Gallagher: He did not act for Uebersee.

Mr. Burling: I agree.

The Witness: We were not the accountants, Your Honor, of Uebersee.

2193 By Mr. Burling:

Q. I apologize. You were the accountant for, so far as you know, all of the American investments of Uebersee, were not? A. Well, as far as I know, yes.

Q. Were you also the personal accountant in America

for Fritz von Opel? A. Only to the extent that we helped prepare tax returns for him in America.

Q. And do you or do you not—

Mr. Gallagher: Just a moment, Mr. Burling. Mr. Boland has brought to my attention something that I think should be clarified. I believe, on the statements that you are now making to the witness, that the witness should be advised that during the years preceding June 7, 1935, Mr. von Opel always claimed to be the owner, and that it was at that time that he claimed that a usufruct was set up.

Mr. Burling: That is purely a matter of argument as to what is in the record, if Your Honor please.

By Mr. Burling:

Q. Will you state now whether in June, 1935, you had any familiarity with the fact that Fritz von Opel or Wilhelm von Opel, through Uebersee, was endeavoring to export from the United States one million and a
2194 quarter dollars in gold? A. How much more clearly can I state it than to say that I knew that there was a suit pending re gold? We had nothing to do with it. We are not lawyers. Therefore, we really had nothing to do with it. I don't know what affidavits were filed and what was not filed.

Q. And the basis of that suit was never discussed with you? A. No, it was not.

Q. And you have no idea, have you, at all whether in the United States District Court for the Southern District of New York the position was taken that the beneficial owner of the gold was Wilhelm and that Fritz had bare legal title? A. I haven't the slightest idea of that.

Q. And you have no idea of what John W. Davis told the Second Circuit? A. I have not the slightest idea.

Q. And that did not interest you at the time? A. No.

Mr. Burling: That is all.

By the Court:

Q. Did you have occasion at any time to bring up the question of ownership of the shares of stock or was that just information that came to you casually? A. 2195 No; it was usually information that came to us casually.

Q. There was no particular event when you asked him questions about it or no point was made as to who was the owner? I mean for accounting purposes. A. No. I just, from the very beginning—it was our feeling that Fritz von Opel and/or Uebersee owned the stock, and I don't suppose beyond that we thought too much about it, frankly.

The Court: Thank you.

The Witness: Thank you.

Mr. Gallagher: Thank you, Mr. Clauson.

(The witness left the stand.)

Thereupon—

WALTER VAN DYKE BAYER was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. Will you state your full name, please? A. My name is Walter Van Dyke Bayer.

Q. And where do you reside, Mr. Bayer? A. I reside at Garden City, New York.

Q. Will you state where you were born? A. I was born in Brooklyn, New York.

2196 Q. And where were you educated? A. I went to a public school in Brooklyn, P.S. 44, Erasmus Hall High School in Brooklyn. I then went to Amherst College in Amherst, Massachusetts.

Q. What degree did you get? A. Graduated in 1919 with a degree of B.A. After college, while working, I went to school at nights at New York University, in a graduate school of business administration, and received a degree in 1924 of M.B.A.

Q. Are you now a Certified Public Accountant? A. I am a Certified Public Accountant since 1926.

Q. Have you ever served on any committees of the New York State Accounting Association? A. In the past —I am a member of the New York State Society of Certified Public Accountants, American Institute of Accountants; and in the past I have served on some technical committees of the New York State Society of Certified Public Accountants, the Federal Taxation Committee, and their Committee on Contingent Liabilities and Commitments.

Q. Now, when did you commence accounting? A. Well, after I graduated from college I was employed by four or five private companies as bookkeeper and accountant. In August of 1922 I went with Haskins and Sells on their staff as a public accountant.

2197 Q. And how long did you remain with Haskins and Sells? A. I was with Haskins and Sells until the end of December, 1927.

Q. And thereafter what? A. Then I went with the J. Henry Schroder Banking Corporation as auditor, and I was with them from the latter part of December, 1927, to the end of 1928.

Q. And when did you become associated with Mr. Clauson? A. Well, I had known Mr. Clauson from about 1922, when I joined Haskins and Sells. He was also with Haskins and Sells, and I met him at that time and knew him from then on, and he was probably instrumental in

my taking the position with the J. Henry Schroder Banking Corporation.

Q. Had you formed an association with him in 1929? A. January 1st, 1929, we started a co-partnership as Certified Public Accountants.

Q. You have been together since that time? A. Our firm has continued in existence since that date.

Q. Do you know Mr. Fritz von Opel? A. Yes, I do.

Q. Do you recollect when you first met Mr. Fritz
2198 von Opel? A. It was the latter part of October, 1931.

Q. And to make this a little briefer, you heard Mr. Clauson's testimony? A. Well, I wasn't listening carefully to all of it.

Q. Will you state, then, the nature of the work you did for Mr. Fritz von Opel or the Uebersee Korporation? A. Well, in October of 1931 we were introduced to Mr. von Opel by Mr. Hoffacker, and arrangements were made and contracts were executed whereby, in connection with the sale of shares of General Motors stock, we were to act to countersign instructions in connection with the sale or purchase and delivery of those shares through the City Bank-Farmers Trust Company.

Q. And down through the years did you do auditing work for various companies in which he and/or Uebersee owned shares? A. I might just mention, in that connection, that we were instructed by Mr. von Opel that we were to prepare his 1931 tax returns—our firm.

Q. And you did that also? A. And we subsequently prepared his 1931 tax return, which was filed in June of 1942—

Q. 1932? A. 1932; pardon me.

2199 Q. Thereafter did your firm audit the books, et cetera, of the various companies in which Uebersee and/or Mr. von Opel owned shares? A. As I recollect, Mr. von Opel, out of the proceeds of this General Motors stock—the contract with Hoffacker on the sale of it was

cancelled early in 1932. Mr. von Opel made certain purchases of securities. In June of 1942—

Q. 1932— A. Of 1932—it is a long ways back—those securities owned by Mr. von Opel were transferred to Uebersee Finanz-Korporation, and from then on Uebersee Finanz-Korporation was the owner.

Q. And thereafter did you then audit the books and records of Spur, Harvard— A. And during this period from '32 on Uebersee Finanz-Korporation acquired an investment in Spur Distributing Company, Harvard Brewing Company, and some companies down in Shreveport known as Oil Production, Inc., and Oil Refineries, Inc., and we were the auditors—our firm were the auditors of those companies.

Q. Now, before I ask you specifically about the companies with respect to which you audited the books, I will ask you this question: In the course of the many years that you worked for Uebersee and in the course of
2200 those years during which you have known Mr. von Opel, have you ever heard him state that these Uebersee shares or the shares in the various corporations on which you were working were owned by his father, Wilhelm von Opel? A. No, never.

Q. Do you know Dr. Hans Frankenberg? A. I have met him. I know him nowhere near as well as I do Mr. von Opel.

Q. Have you ever heard him make a statement that Wilhelm von Opel owned the Uebersee shares or the shares of Harvard or any of these other corporations? A. No, sir.

Q. Do you know Mr. Theodore Hoffacker? A. I knew him in days of old.

Q. Did you ever hear him state that Wilhelm von Opel owned these shares of Uebersee or the shares in these various corporations which we are referring to? A. No, I never did.

Q. Did you ever hear him say that he was the agent of Wilhelm von Opel? A. No, I never did.

Q. Do you know a man by the name of Mr. B. F. Crittenden? A. I think it is B. P. Crittenden.

Q. B. P. Crittenden. I am sorry. Mr. Bayer, Mr. Crittenden has been a witness in this case for the defense, and on several occasions—specifically, to start off with, page 1921 of the record and page 1923 of the record—Mr. Crittenden, in talking about your reference to von Opel and Frankenberg, used this type language. In speaking about Bayer, he says, on page 1921:

2201

"He"—meaning, you—"always referred to them as the Germans."

Now, I will ask you if you ever referred to these people as the Germans? A. I am quite positive that I never used any such term. It is quite contrary to my manner of talking and my mode of speaking.

Q. Now, Mr. Bayer, I want to read from page 1922 of the record, and I might give you a little background without reading it all. Mr. Crittenden had stated that in 1937 they wanted to form a consolidation of interests, and he named a number of companies that were to be consolidated. This is 1937. A. Who wanted to form a consolidation?

Q. Crittenden said that he and Uebersee wanted to form a consolidation, and in naming the companies in 1937 that were to be consolidated, he named the Trio Refining Corporation, the Centera Pipelines, the De Soto Crude Oil, the Rhodesia Oil Refining Corporation, and they were all to be combined with Oil Refineries and Oil Production into a company known as Hurricane. A. Yes.

2202

Q. Now, I will ask you, When was Hurricane formed? A. Hurricane Petroleum Corporation; I believe, was formed around the middle of 1935.

Q. So, it already was in existence two years before 1937? A. That is my recollection. Hurricane Petroleum

Corporation became the result of a merger between Oil Production, Inc., and Oil Refineries, Inc., which had previously existed as separate companies.

Q. And did they absorb, prior to 1937, the Trio Refining Corporation and several others? A. I believe that Trio Refining Corporate De Soto Crude Oil Purchasing Corporation, which had been acquired by Grogan and Crittenden, were purchased by Hurricane Petroleum Corporation during 1935, and that subsequent to that, within maybe eight or nine months, possibly, or less, Trio Refining Corporation was dissolved and became part of Hurricane Petroleum Corporation, and De Soto, which was 100 per cent owned by Hurricane, remained as a subsidiary company, and that took place in 1935.

2203 Q. 1935? A. Or earlier.

Q. So when you are talking in 1937 about any merger, you were merely talking about Rhodesia and Petroleum joining in— A. We would be talking about Hurricane Petroleum Company and Rhodesia.

Q. All right. I want to read from the bottom of page 1922 and page 1923, leading up to one sentence on which I will then ask you a question. The question to Mr. Crittenden was:

"Now, you said that you agreed with Mr. Bayer to evaluate your interest and he would evaluate the other interest? Was anything done in that connection?

"Answer: Yes, it was done.

"Question: And what happened?

Now, you can exclude the representation about the words "the Germans" in your answer, because you have already answered that you never used that expression.

Here was the answer Mr. Crittenden gave, and I now want you to state whether that is correct. He stated:

"Bayer notified us—notified me, or he notified Grogan and me, that the Germans would like to have us come to Switzerland, complete the transaction, and we went."

2204 I ask you, Is that statement correct? A. I don't think it is fully correct, no.

Q. Will you state your understanding? A. My recollection is that Rhodesia, which had been formed by Grogan and Crittenden, was in existence from 1935 on, and we were requested by Grogan and Crittenden to make an audit of Rhodesia as of May 31, 1937, and apparently there was some thought on their part that it would be desirable to have Rhodesia become connected in the Hurricane picture; and I think that there may have been some discussions with me on that subject, in connection with the audit; and the latter part of June, 1937, just recently referring to my diary, Grogan, Crittenden, and McGowan, who was the lawyer for the Shreveport properties, came to New York and we had some discussions about Rhodesia; and it is possible that at their request I sent a cable, or there was sent a cable, abroad to von Opel whether he would be interested in such a consolidation.

Q. So on the question of which was first, the cart or the horse, it was Mr. Crittenden in this instance and Mr. Grogan who were anxious to put forth to Mr. von Opel this question of consolidation, rather than, as Mr. Crittenden said, "Bayer notified us that the Germans would

2205 like us to come to Switzerland and complete the transaction"; is that correct? A. That would be my recollection. In other words, I think it is quite possible that, as a result of their request, that I did pass on some information to them as an intermediary.

Q. But the initial start of it came from this side? A. There may have been discussions prior between Mr. Crittenden and Mr. von Opel, because there was a complication on the Rhodesia Company. In other words, I think that there was an exception taken to the fact that they, while acting as managers of the Shreveport properties, had gone into sort of a competitive business.

Mr. Hoffacker had acquired 300 shares of Rhodesia

stock, and there was a lot of exception taken to that situation.

So that there was a clarification of interests and issues that was involved and may have continued for a period prior to this audit that we eventually made in May, 1937, and the eventual discussions, but I think it was, as far as I recollect—Grogan and Crittenden were more interested in having the properties merged than Mr. von Opel was.

Q. Now, as a result I know you went to Europe. 2206 I am going to ask you at this moment, Who paid the expenses of your trip? Did Uebersee or Mr. Fritz von Opel pay those expenses? A. I kept a fairly careful record of my expenses. My wife was accompanying me on the trip. Since Mrs. Crittenden was going along and her expenses were paid for by myself and my wife, and certain expenses that were considered personal travel expenses were paid by us—

Mr. Burling: May I ask for an elucidation of whom "her expenses" refers to?

Mr. Gallagher: Mrs. Bayer.

The Witness: My wife's.

Mr. Burling: Your wife's. Thank you, sir.

The Witness: My wife, who accompanied me on that trip. The remainder of the expenses, plus a charge for my time while abroad, after discussion with Mr. Crittenden, were charged one-half to Hurricane Petroleum Corporation and one-half to Rhodesia Oil and Refining Company, and were paid for by those companies.

By Mr. Gallagher:

Q. Now, Mr. Crittenden stated, at page 1923 of the record, in response to the question, How long did he stay in Zurich?

"I guess the better part of three weeks."

2207 Now, do you have any records or notes which would reflect how long you were in Zurich? A. Yes. I have made a little check back on that from the expense records that I kept. We arrived in Cherbourg on the morning of Thursday, July 29. Friday morning, July 30, we took a train from Paris to Zurich and arrived in Zurich late that afternoon or early evening.

We stayed there at Zurich that Friday night—

Q. I might ask you, during this traveling that you were relating were you with Mr. and Mrs. Crittenden? A. There was a party of five that were enroute together during the time we arrived in Cherbourg until the time that we eventually arrived in London.

Q. Was Mr. Crittenden a part of that party? A. Mr. and Mrs. Crittenden, Mr. and Mrs. Bayer, and a Mrs. Lyons.

Q. All right. Go ahead. You are arriving in Zurich. A. We arrived, as I said, in Zurich late in the afternoon or early evening of July 30, on Friday.

We stayed in Zurich on Saturday, July 31, to Friday morning early, August 6th. So that there were a Saturday, a Sunday, and four week days, Monday, Tuesday, Wednesday, and Thursday.

2208 Friday morning, August 6, the five of us, with a chauffeur, started on an automobile trip through Switzerland and the northern part of Italy, and we stopped off at St. Moritz. This trip—the itinerary of that particular trip, I believe, was suggested by Mr. von Opel as an interesting trip to take.

We stopped at St. Moritz, Locarno—

Q. You do not need all that; just generally.

Mr. Burling: Is he coming back to Zurich?

The Court: I did not think he needed all the details.

The Witness: We arrived back in Zurich late Tuesday afternoon or early evening of Tuesday, August 10. In

other words, we were away approximately five days. We then stayed in Zurich the following day, Wednesday, August 11, and part of Thursday, August 12, and after lunch we took a train from Zurich with the ultimate destination to be The Hague in Holland.

By Mr. Gallagher:

Q. But you were in Zurich altogether, then a total of about six and a half days; is that correct? A. Well, it would be seven and a half days, including Saturday and Sunday.

Q. Now, while you were in Zurich did you participate in conferences with Fritz von Opel, Mr. Crittenden,
2209 and Dr. Frankenberg? A. I participated in discussions and conferences and negotiations in connection with this proposed merging of interests.

Q. Where did these conferences take place, if you recollect? A. Well, the conferences, as I recollect, all took place in a conference room of the Adler Bank.

Q. I might ask you at this time this. Mr. Crittenden stated, on page 1924 of the record:

"Dr. Frankenberg did most of the questioning."

Now, was this discussion run in a manner in which Frankenberg was, as Crittenden said, doing most of the questioning, or would you describe the atmosphere? A. Well, I would say it was not a questioning type of discussion. It was a question of arriving at a possible meeting of the minds. There were undoubtedly questions asked back and forth, and possibly Dr. Frankenberg may have asked more questions of Mr. von Opel, since he was not as familiar with the Shreveport properties.

Q. By the way, did he speak very good English at that time? A. Yes. He was definitely understandable, without any difficulty.

2210 Q. Now, Mr. Crittenden stated again, reading from the record at page 1928:

"Question:"—And this was to Mr. Crittenden by Mr. Burling—"And did you have any other conversation with Frankenberg at this time?

"Answer: Yes, I did. I asked him very frankly what his relation was to Fritz von Opel and the business; and his reply was very simple and direct.

"He said that he represented Fritz von Opel's father on many occasions in many places for many years and was assisting his father."

Now, I will ask you, Did you hear Dr. Frankenberg make any such statement? A. No, I did not.

Q. Now, after you left Zurich—

Mr. Burling: Just a moment. I object to the question that has just been asked on the ground that the record makes no showing that Crittenden said he said this in the presence of this witness. The testimony is that he had a discussion with Frankenberg about Frankenberg's Degas paintings, and then he said this. There is no showing that this witness was present.

Mr. Gallagher: I asked this witness if he was at the conferences.

2211 The Court: I will let him answer. Whether it throws any light on it, you can argue. I do not remember him saying that Mr. Bayer was present.

Mr. Gallagher: He stated it earlier:

"Usually there was present Fritz von Opel, Walter Bayer, Hans Frankenberg, and myself."

The Court: On the occasion of this discussion?

Mr. Gallagher: I will ask Mr. Bayer that to clarify that.

By Mr. Gallagher:

Q. Were you present at all the conferences that were held during these few times in Zurich in the bank, and to the best of your recollection? A. To the best of my recollection, I was present at all conferences that related—

Mr. Burling: If Your Honor please, I do not know how this witness could testify that Frankenberg could not and did not have a conversation when he was not there.

Mr. Gallagher: He could have gone down to the men's room and they could have had it. I admit that. But I want to point out that he was at all the conferences and did not hear it.

By the Court:

Q. Were you present at any time when a question was asked by Mr. Crittenden of Mr. Frankenberg as to
2212 who the owner of the property was? I mean what the relation of Mr. Frankenberg was to the enterprise. A. I have no recollection of it, no.

Q. Do you have any definite recollection of any discussion while you were over there with regard to the ownership and control of these corporations? A. I don't recollect that that was ever brought into the discussion, that there was any feature of that that was involved in any discussion.

The Court: All right.

By Mr. Gallagher:

Q. Now, after you left Zurich—to help expedite this, I will lead him just a little bit—you went to Mainz, Germany, and took a boat down the river? A. After we left Zurich on the train, we stopped the first night at Mainz, Germany.

Q. Did Mr. Crittenden suggest or did Mr. von Opel suggest to you gentlemen or Dr. Frankenberg that you see Wilhelm von Opel while you were in Germany? A. No.

Q. Would you believe it true if I were to tell you that Wiesbaden, where Wilhelm von Opel resides, was about 15 minutes from the town of Mainz, which you referred to

as the place you stopped at the first night? A.
2213 Well, I would have no reason to believe or disbelieve.

Q. But there was no discussion of going and seeing Wilhelm von Opel?

Mr. Burling: That is, you mean 15 minutes by air?

The Court: Well, that is not testimony. He does not know anything about it.

By Mr. Gallagher:

Q. Now, you were traveling in intimate contact with Mr. and Mrs. Crittenden all during your trip in Europe; is that correct? A. Yes, and until we arrived in London.

Q. On any occasion or at any time there during your close association in Europe or any time subsequently in the States did Crittenden ever tell you that Fritz von Opel was not the real owner of these companies; that it was Wilhelm von Opel; and that Frankenberg was Wilhelm's agent? A. Did Mr. Crittenden ever say that to me?

Q. Yes. A. No.

Q. Never in all this travel around Europe? He never mentioned it once to you? A. No, sir.

Q. You have previously stated that no one ever made that statement to you; is that correct? A. That is
2214 correct.

Q. I might ask you this, Mr. Bayer. If you had been advised by anybody at any time that Wilhelm von Opel really owned these properties and that it was not Fritz, would you have remembered that statement? A. I am quite sure that I would, because in connection with the preparation of the tax returns for Uebersee and von Opel—I don't think we would have prepared the returns if we felt that there was a question of ownership.

Q. All right. Thank you.

By the Court:

Q. The ownership would not have any relation to the corporation's return, would it? A. No, I don't—well, it would have, possibly, in some of these years that personal holding company taxes were involved, these years 1936 through 1941, where the income was taxed to Mr. von Opel on a consent dividend basis.

Q. His personal returns would have some relation. Did you handle his returns through that period? A. We handled his returns through all of the period from 1931 on. It is possible that in some of these years there was not any taxable income, and I would not be sure whether—

The Court: All right. I do not want to get off 2215 on that.

The Witness: But I think returns were filed for all of the years for Mr. von Opel.

By Mr. Gallagher:

Q. Did you ever see Wilhelm von Opel, by the way? A. No.

Q. Did you ever get any orders or directions or letters from him? A. We never had any correspondence with him at all.

Q. Never sent him any financial statements at all? A. No; never knew of him or had any correspondence with him.

Q. Now, turning to page 1957, Mr. Burling was talking to Mr. Crittenden about a Mr. Ulrich. Did you know a man by the name of Mr. Ulrich? A. Yes, I knew him, and I would see him once in a great while.

Q. Was he associated for a time with the Hurricane Oil Company? A. He was connected with the Shreveport companies, Hurricane, and so on.

Q. By the way, Hurricane finally went bankrupt, didn't it? A. Went bankrupt, I believe, in June of 1940.

Q. Mr. Crittenden, in testifying, stated, at page 2216 1957:

"Question: After Mr. Ulrich was put in charge of the Hurricane Corporation, did the company then get into difficulties?

"Answer: Immediately.

"Question: What year was that?

"Answer: 1938.

"Question: Can you give us the approximate month?

"Answer: Oh, let us say in the middle of the year, Mr. Ingoldsby.

"Question: About the middle of 1938. Do you feel that the reason that the company got into difficulty in the middle of 1938 was a lack of capital?

"Answer: I do.

"Question: You do feel that was it?

"Answer: That was one reason, and it was—the principal reason was Mr. Ulrich's behavior and utterances."

Now, as a result of your duties with the Hurricane Oil Company, can you state the reason why the Hurricane Oil Company did get into difficulty? A. My opinion was that they had greatly over-expanded for their working capital and that when economic conditions went 2217 against them that they were not able to weather the storm.

Q. When did this overexpansion become evident?

The Court: I think we are getting too remote. If I am going to have to decide that issue, I am going to have a problem.

By Mr. Gallagher:

Q. Just one further question. There was some further testimony in this case, Mr. Bayer, about a meeting in

Montreal in 1936, at which Dr. Frankenberg and Mr. von Opel, Houghland, and Crittenden all appeared. There was some testimony you were at that same meeting. Is that correct? A. I was up in Montreal for about three days plus a Sunday in June of 1936, that is correct.

Q. Now, there was some testimony from Mr. Crittenden to the effect that the impression that was given at that meeting was that Wilhelm von Opel owned this property and that Hoffacker and all were Wilhelm's agent. Was that your impression from that meeting? A. No, I never got that impression from any meeting.

Mr. Gallagher: All right. That is all.

Cross Examination

By Mr. Burling:

Q. I have just a few questions. You see Fritz von
2218 Opel here, do you not (indicating)? A. Yes.

Q. And you know Hans Frankenberg also? A. That is correct.

Q. And I think you testified that you knew the two men equally well? A. No, I did not. I said I knew Mr. von Opel much better than Dr. Frankenberg.

Q. I did not mean to put words in your mouth; I misunderstood you.

You filed the tax returns both for Fritz von Opel personally and for Uebersee Finanz-Korporation up until and including the year 1942; is that right? A. Well, my firm did, and I probably supervised most of the—

Q. I do not mean you physically did the typing. You were in charge of the filing of the returns; is that correct? A. That is correct.

Q. Will you state when the personal holding company tax returns for the Uebersee Finanz-Korporation were filed for the years 1936, 1937, 1938, 1939, 1940, and 1941? A. When were they filed?

Q. Yes, please. A. Personal holding company taxes?

Q. Yes, please. A. They were filed in, I think,
2219 in June of 1942—June or July of 1942.

Q. And the failure or omission—I do not mean that there was anything wrong about it—, A. Yes.

Q. The non-filing of the personal holding company taxes for the years 1936 to 1941, inclusive, until 1942, was on the basis of a statement made to you either by Fritz von Opel or by Dr. Frankenberg that Uebersee had ceased to be a personal holding company; is that correct? A. That is correct. That statement, I believe, was made in Montreal in June of 1936.

Q. Now, can you recall in what words either Frankenberg or von Opel said to you that Uebersee was no longer a personal holding company? A. Well, as I recollect, I was informed that Mr. von Opel had sold his shares of stock to the extent, anyway, that he did not own 50 per cent of the stock and that his interest had been converted —in Uebersee—had been converted into a substantial indebtedness of some character by Uebersee to Fritz von Opel.

Q. Now, Mr. Bayer, I want to ask you this question. It is a little bit technical. I ask you to listen to me carefully.

2220 Were you told that Fritz von Opel had gone through the following transaction: that he, through a Liechtensteinean legal entity, had contracted with a Swiss bank whereby a Swiss bank would nominally place the shares of Uebersee with eleven of its clients under a contract that the shares were to be returned to Mr. von Opel through this Liechtensteinean entity at the same price that had first been paid, and that, in addition, there was also a contract that the nominal purchasers were to give proxies so that the shares could be voted as Mr. von Opel directed, and also that, irrespective of the true earnings of Uebersee, these nominal holders were to receive 6 per cent as a fee?

Mr. Gallagher: If Your Honor please—

Mr. Burling: I just want to know if he was told this.

Mr. Gallagher: It seems to me we are getting very far afield. This is a rebuttal witness. There has been nothing asked him on direct about these shares.

The Court: The only way that it would be admissible would be in connection with that conversation you asked him about in Montreal. Is that the same conversation he is talking about?

Mr. Gallagher: All I asked him about in Montreal was the impression given—

Mr. Burling: One of the assertions is—

2221 Mr. Gallagher: This is not our case in chief, though, Mr. Burling.

The Court: Let me get it clear so I can rule on it. What did you ask him?

Mr. Gallagher: All I asked him about Montreal was the impression given. I said there had been some statements through Mr. Crittenden that the general impression was that Wilhelm von Opel really owned all this property and that Frankenberg was the agent.

I said, "Was that your impression?"

He said, "No; I never had any such impression."

That was all that was asked about the Montreal meeting.

Mr. Burling: This cuts two ways. If the answer is yes, that goes to impeach the credibility of the witness. He participated in the scheme to defraud the United States, which is admissible on his credibility. I do not think the answer would be yes. I do not believe this witness knew that.

If the answer is no, I just do not want to insult the witness, but either way the answer would be admissible, because the other way the auditor was deceived as to the true ownership, which would go to the part of the testimony which Mr. Gallagher brought out.

Mr. Gallagher: I merely brought out the testi-
2222 mony as to the ownership of von Opel.

Mr. Burling: If this witness was lied to in Montreal as to the state of the ownership of Uebersee, it is highly material as to what impression he got.

The Court: That is the only ground that I think it may be admissible on. Let us find out if he heard that.

Mr. Burling: Do you recall my question or shall I restate it?

A. I might just simplify it by saying that I was not given any details as to what had happened.

By Mr. Burling:

Q. You were just told that a sale to Swiss stockholders had taken place and that it was Frankenberg's opinion that the company was no longer a personal holding company; is that right?

Mr. Gallagher: Just a moment, now. He has not stated anything about its being Frankenberg's opinion.

Mr. Burling: I will come to that. I am asking him, if Your Honor please—

Mr. Gallagher: Ask him whose opinion it was.

Mr. Burling: I just did, if Your Honor please. The question was, Weren't you just told by Frankenberg—

The Court: We have a very unusual situation here. We generally do not ask witnesses what impression they
2223 have. When you ask him about impressions, I guess that gives him a little latitude.

Mr. Gallagher: This is a rebuttal witness to correct an impression that Mr. Burling got from the witness.

The Court: Impression testimony is not really evidence. I have permitted testimony from both sides on that. I have not stopped you. Having testified to an impression, I will

give him a little latitude on that. Let us ask him one or two questions on that.

Mr. Burling: Yes, sir.

The Witness: Well, I don't know that it was Frankenberg that was the one that told me. You started off—we had a lot of intermediate discussion there. I think that the information came from possibly both Mr. von Opel and Dr. Frankenberg.

By Mr. Burling:

Q. Do you recognize the handwriting which appears at the bottom of page 3 of Defendant's Exhibit 83 (handing a document to the witness)? A. Yes.

Q. Whose is it? A. That is my signature.

Q. Now, will you examine the third paragraph of the first page of this document, and I call your attention to the following words:

2224 "Since we were informed by you"—this is a letter addressed to Frankenberg in June—"that Uebersee is no longer a personal holding company, we will eliminate that tax from our consideration."

A. That is correct.

Q. Does that refresh your recollection— A. That refreshes my memory that we did receive a letter from Dr. Frankenberg, but that was subsequent to Montreal.

Q. I don't care whether it was in Montreal or where it was. Were you informed by Dr. Frankenberg that Uebersee was no longer a personal holding company? A. We were informed by Dr. Frankenberg, but when we were informed that way we were not informed—that was merely a statement from him. There was nothing about stock ownership in that letter, or indebtedness.

Q. Do you now remember whether Frankenberg told you that Uebersee was not a holding company—a personal holding company? A. In writing, yes.

Q. Will you state whether that was the basis of your omission to file personal holding company taxes? A. That would be correct.

Q. Now, were you told by Frankenberg of the nature of the purported transfer to Swiss nationals that I
2225 have previously described? A. That I could not recall whether it would have been from Dr. Frankenberg or Fritz von Opel.

Q. Were you ever told of the situation which I have just described? A. All the details?

Q. Yes. A. No.

Q. You had no idea until this minute, did you, that the transfer was a transfer with warrants back to the owner, with an agreement to pay a fixed fee, with an agreement that the purported stockholders would vote the stock as they were directed, and that the shares were held—

Mr. Gallagher: Just a moment, Your Honor. There has been no evidence put into the record about a purported transaction. The testimony has been quite to the contrary.

The Court: I will permit the testimony.

Did you hear that?

The Witness: Of course, when these tax returns were filed for these years involved, I then knew that there was an element of options involved, but that is about all. I did not know any of the details such as are being explained now—voting, and so forth.

By Mr. Burling:

2226 Q. You were the auditor, were you, of Oil Production and Oil Refineries, Inc., in the year 1937, or was it Hurricane? A. Hurricane Petroleum Corporation.

Q. Now, in your capacity as auditor, do you know who paid Crittenden's passage to Europe in the summer of 1937? A. Well, I would not recall for sure. I would

imagine that it was paid partly by Hurricane and partly by Rhodesia, the same as my own, but I could not say definitely.

Q. Can you recall the hotel that the party of five that you described stayed at in Zurich? A. Yes; we stayed at the Baur-au-lac.

Q. B-a-u-e-r? A. B-a-u-r -a-u- l-a-c, Baur-au-lac.

Q. And Fritz von Opel was staying there too, wasn't he? A. I don't think he was. I think he was staying at the Dolder.

Q. Wasn't that Frankenberg that was staying at the Dolder? A. Frankenberg, as I recall, had a permanent room at the Dolder.

Q. At the Dolder? A. Yes, and I think Mr. von
2227 Opel also stayed there.

Q. And you and Crittenden on at least one occasion went to see Frankenberg at the Dolder, did you not? A. That I don't really recall.

Q. Now, will you state again what was said to you in October, 1931, either by Hoffacker or by Fritz von Opel relating to certain funds? A. Well, I think in October, 1931, the only discussion was about some transactions in General Motors stock that Hoffacker could buy and sell and trade in.

Q. When did you commence auditing the accounts of either Fritz von Opel or Uebersee—that is, for what period? A. We never audited any accounts of Uebersee.

Q. When did you keep books—whatever the technical term is? A. We did not keep books for Uebersee. We prepared tax returns based upon available information.

Q. When did you first engage in any accounting transaction for Fritz von Opel or any other person associated with him that you know of? A. Oh, I would say the latter part of October, 1931.

Q. And you knew at that time, did you not, that his

funds were in a Custodian account at the City Bank-
2228 Farmers Trust Company? A. I don't recollect that there was a custodian account there.

Q. Will you examine Plaintiff's Exhibit 70 and state whether you ever saw it before (handing a document to the witness)? A. These are the papers of the City Bank-Farmers Trust?

Q. This has been admitted by the plaintiffs in this action as a photostatic copy of a document obtained from the files of the City Bank-Farmers Trust Company. State whether you ever saw it before. A. I don't recall ever having seen it.

Q. But, in any event, as of October, 1931, you maintained accounting records, did you not, indicating that Fritz von Opel had certain dollar accounts and certain security accounts in a custodian account? A. We had some work sheets, as I recall.

Q. And they showed that Fritz von Opel had an extended account; isn't that true? A. Oh, I would think so.

Q. Now, whom were you told Fritz von Opel was custodian for? A. My recollection is that it was the City Bank custodian account for him.

2229 Q. Weren't you told that Fritz von Opel was custodian for anyone? A. Not that I recollect.

Q. Didn't you know that he was acting at that time as attorney in fact for any person?

Mr. Boland: I object to that question. Just a minute.

The Court: If he knows it. He testified—

Mr. Boland: May I have the question read again? Maybe I misinterpret it.

(The last question was read by the reporter.)

The Court: I will permit that.

Mr. Boland: Yes. I misunderstood the question.

The Witness: Not that I recall.

By Mr. Burling:

Q. You were never told that shares of Adam Opel, A.G., had been sold to General Motors, and that the letter of sale was signed Wilhelm von Opel by Fritz von Opel, attorney, or attorney in fact? A. I don't have any recollection of it.

Q. About how many times would you say you went to the office of Adler and Company in Zurich in the summer of 1937? A. Well, my recollection would be that during the dates of Monday, Tuesday, Wednesday, and
2230 Thursday that we had conferences and discussions during the part of a morning and that after lunch, for part of or most of the afternoon, and whether we did it on Saturday when we first arrived, I really don't know.

Q. And then you went on this trip you described? A. That is right.

Q. And after your return to Zurich you had additional conferences, did you not? A. No. When we left on the trip, an agreement, a meeting of minds, had been reached, and that was dated as of the date of August 5, before we went way on that trip.

Q. There was a writing drawn up? Is that your testimony? A. There was an agreement that was drawn up and eventually signed, I believe.

Mr. Burling: May I ask if counsel asserts that we have received this or seen it?

Mr. Gallagher: I do not believe I have seen it. Have you got it?

The Witness: I have it here. It was in our files that you have seen.

By Mr. Burling:

Q. May I see it, please? A. Yes (handing a document to Mr. Burling).

2231 Mr. Burling: Your Honor will recall that both Frankenberg and Fritz von Opel testified that there was no business conversation in Zurich at all.

Mr. Gallagher: I do not believe the record reflects that at all, Your Honor.

The Court: Well, I will hear that later.

By Mr. Burling:

Q. Do you recognize Mr. Myron Baum in this courtroom? A. Yes, I recognize him from what I have seen of him.

Q. You told him you were showing him all of your files relating to Uebersee? A. No; I don't think that that was so—

Q. I know it wasn't so. I am asking you if you did not tell him so.

Mr. Gallagher: Just a minute. Let the witness answer the question more fully, Mr. Burling.

Have you anything more to say?

The Witness: I was going to say that Mr. Baum looked through our file that was marked von Opel, but that he did not look through our file marked Uebersee. He did not ask for it.

By Mr. Burling:

Q. You know that Mr. Baum has been working on the Uebersee case as a Government lawyer for years, do
2232 you not? Didn't he tell you that? A. He spoke about the fact that he had been in Europe the summer before.

Q. Didn't he tell you that he had spent years of his life working on the Uebersee case? A. I don't know that he used those exact words.